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Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* INDEPENDENT WOMEN'S FORUM, WOMEN'S ECONOMIC PROJECT, DIANA FURCHTGOTT-ROTH, LINDA CHAVEZ, LYNNE V. CHENEY, CHRISTINA HOFF SOMMERS, ABIGAIL THERNSTROM IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE*

The Independent Women's Forum (IWF) is a nonprofit, nonpartisan organization founded by women to foster public education and debate about social and economic policies, particularly those affecting women and families. IWF sup-

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* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

ports policies that promote individual responsibility, limited government and economic opportunity.

In April 1993, in an earlier phase of this case, IWF (then known as Women's Washington Issues Network) filed a brief *amicus curiae* in support of the petition for certiorari by the Commonwealth of Virginia and Virginia Military Institute, now Respondents and Cross-Petitioners. In its earlier brief, IWF argued that single-sex educational institutions are an important element in achieving a State's educational mission, that States should be able to tailor educational programs to respond to the distinctive needs and interests of each sex, and that single-sex education should continue to remain eligible for public funding and support.

The names and interests of other *amici* are set forth in the attached Appendix. Many of the individual *amici* are current or former teachers or otherwise active in the field of education. Among the approximately 550 members of IWF many are graduates of all-female schools, and many have family members who have attended single-sex schools. *Amici* strongly believe that single-sex education is an effective and beneficial pedagogical tool, which should be available for both male and female students and in both publicly and privately supported institutions.

SUMMARY OF ARGUMENT

The legal standard set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982), applies to single-sex admissions policies in state-supported schools. The *Hogan* test requires "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)." 458 U.S. at 724.

In this case the fourth circuit court of appeals has twice affirmed the district court's findings that single-sex educational programs are pedagogically justified and substantially related to achieving an important governmental objective, namely, providing the Commonwealth's citizens a diverse array of educational opportunities. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992) (VMI I); *see also United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (VMI II). There is no reason, either factual or legal, why this Court should set aside those findings.

Every State has a strong, legitimate interest in providing its citizens a system of education that is both educationally and economically sound. In deciding whether and to whom they will offer specialized educational programs States should be permitted to make reasonable allocations of their resources. The Equal Protection Clause does not deny States the power to treat different classes of persons differently, nor does it require States to confer benefits on all classes equally or equivalently.

The *Hogan* standard imposes an "intermediate" level of scrutiny on sex-based school admission policies. Petitioner has argued in its opening brief in No. 94-1941 that "strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex." (U.S. Br. 33) Accepting petitioner's argument would be an unwarranted and unwise departure from this Court's precedents.

Racial classifications are subject to strict scrutiny because we regard racial differences as purely superficial. Differences between men and women, however, are real and substantial. Applying strict scrutiny to gender classifications would be unreasonable and unfair to both sexes. The judgment of the court below applying the "intermediate scrutiny" *Hogan* standard should be affirmed.

ARGUMENT

I. The Equal Protection Clause Permits States To Offer Single-Sex Educational Programs If The Programs Are Substantially Related To The Achievement Of An Important Governmental Objective.

In VMI I, the fourth circuit appeals court acknowledged the practical difficulty of interpreting the Equal Protection Clause.

> The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address and, before that, the Declaration of Independence, and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976, 29 L. Ed. 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike. . . .").

VMI I, 976 F.2d at 895 [footnotes omitted].

The difficulty becomes most evident in cases involving classifications based on sex. It is easy to accept the proposition that a person's race or ethnic origin bears no relation to the person's character, abilities or performance; therefore a classification based on race or ethnic origin is inherently suspect – that is, it is assumed to be unjustified and most likely unjustifiable. Sex-based classifications, on the other hand, are

sometimes justified and sometimes not. Men and women share many of the same human characteristics and in many ways are equally capable, but men and women also differ in significant ways. To compound the difficulty, male and female children have differences and similarities that change as they mature into adults.

To apply the Equal Protection Clause intelligently in the case of a gender-based classification, one cannot assume, as one does in the case of race, that the classification is in all likelihood unjustified. Because there are real differences between men and women, a particular law treating them differently might be entirely justified. The only fair way to proceed is to undertake an open-minded inquiry into the substance and purpose of the classification. This is no easy task, as the fourth circuit court and many other courts have remarked, but any other approach would be dishonest and would violate common sense.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, is the controlling precedent for this case. *Hogan* involved the single-sex admissions policy of a state-supported college. The Court held in *Hogan* that the party seeking to uphold a gender-based classification must show "an exceedingly persuasive justification" for it. Under *Hogan*, a gender-based classification can be justified if it is substantially related to the achievement of important governmental objectives. *Id.* at 724.

VMI's admissions policy, having been exhaustively examined in two trials and two appeals, meets the *Hogan* standard. The Commonwealth's objective has been to provide for the needs of a broad range of students at the post-secondary level. In VMI I, the appeals court accepted the district court's findings of fact, specifically including a factual determination that "single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." 976 F. 2d at 898.

The appeals court found, however, that the Commonwealth had "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 900. To remedy this deficiency the Commonwealth, in partnership with VMI and Mary Baldwin College, established the Virginia Women's Institute for Leadership (VWIL) program, which incorporates the transferable elements of VMI's system together with elements aimed at the developmental needs of young women.

After a second trial to evaluate the sufficiency of VWIL as a remedy, the appeals court held, in VMI II, that it is a legitimate and important government objective to provide single-sex education as one option within a publicly financed system of education. It also affirmed that the single-sex programs at VMI and VWIL are substantively comparable and will operate so as not to exclude either sex from the benefits of a leadership-oriented "VMI-type" of education.

After two full rounds of trial and appeal below, there can be no doubt that Virginia's system of higher education, which now includes single-sex programs for both male and female students, complies with Equal Protection Clause requirements as articulated in *Hogan*. Petitioner supports its arguments to this Court with a few colorful or offhand statements painstakingly extracted from the record. As respondents' briefs show, these isolated remarks mischaracterize the weight and authority of the testimony by numerous highly qualified experts at two separate trials.

Petitioner invariably condemns as a "stereotype" any fact that interferes with petitioner's preconceived idea about the "correct" outcome of this case. Respondents, on the other hand, have followed *Hogan* and taken its mandate seriously at every step. They have done the hard work of examining their goals and methods, gathering data and expert opinions, studying the options, and justifying their final decision. The outcome – a pedagogically sound and useful program that

fulfills real needs – is where the *Hogan* standard has led them. This Court should affirm the application of the *Hogan* standard in this case so that there will be no future doubt that other States may in a similar manner offer and support single-sex programs among an array of educational methods.

II. States Should Be Allowed To Determine How Best To Allocate Their Educational Resources.

This Court has granted respondents' cross-petition for certiorari on the question whether the Equal Protection Clause, as it was interpreted by the fourth circuit court of appeals, requires states to offer parallel single-sex educational opportunities for both sexes. *Amici* agree with respondents that this question should be settled by this Court's confirming that *Hogan* does not impose any such additional requirement.[1]

Under the existing *Hogan* standard, States must provide an exceedingly persuasive justification for gender classifications by showing that they are substantially related to achieving an important governmental objective. 458 U.S. at 724. If a State statute or action benefits one sex without hurting the other, it is unnecessary to consider the interest of the excluded sex at all.[2] If a State statute or action benefits one sex to the detriment or disadvantage of the other, it may be necessary to consider the interest of the excluded sex, but there may still be "exceedingly persuasive justification" to pursue the program for the benefit of the one sex.[3] If a case arises in

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[1] Respondents have committed themselves to support both the VMI and VWIL programs even if this Court holds that parallel programs are not required when a State offers a single-sex program for either sex. (Va. Opening Br. 3 n.1)

[2] For example, there is no real male parallel to a program for pregnant women.

[3] For example, "boot camp" programs to rehabilitate criminals might be prohibitively expensive if they had to be duplicated for both men and

which fairness dictates parallel programs for both sexes, following the existing *Hogan* standard will reveal this shortcoming: either the objective or the means of achieving it will prove to be faulty under an intermediate scrutiny analysis. We should not assume, as a matter of law, that for every gender-related action there must be an equal and opposite reaction.

In the case of education especially, States should be entitled to consider need, demand and economies of scale when determining whether and to whom they will offer specialized programs. Every child is different from every other child. In an ideal world, to ensure that every child received a perfect education, we probably would assign each one a personal tutor. In the real world, States and localities struggle to allocate limited resources in a way that will provide suitable educational opportunities for most children. The *Hogan* standard should permit States to make reasonable economic decisions relating to the mix of educational opportunities and should not impose additional conditions to achieve a formalistic parallelism for its own sake.

III. The Court Should Not Apply Strict Scrutiny To Gender Classifications.

Petitioner has argued in its opening brief in No. 94-1941 that the Court should adopt for gender classifications the same standard now applicable to race classifications, that is, strict scrutiny. (U.S. Br. 33) The Court should explicitly reject the Petitioner's argument and instead affirm the decision

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women. Rather than limit the choice to "both" or "neither," the Equal Protection Clause should allow states to balance the costs and benefits to all their citizens. Thus, for example, a state might be able to deny female criminals access to a costly parallel program so that society as a whole could obtain the benefit of rehabilitating possibly larger numbers of more violent male criminals.

below by reiterating the standard the Court laid out in *Hogan*, 458 U.S. at 724.[4]

Prior decisions of this Court specifically acknowledge the difference between race and gender classifications and the substantial reasons for those differences. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985), the Court stated the "general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." In those cases "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* The Court then continued:

> The general rule gives way however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. The Court then further contrasted the levels of scrutiny given to race and gender classifications, quoting from *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion):

> [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.

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[4] The Court most recently invoked the *Hogan* standard in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1424-25 (1994).

Rather than being "deemed to reflect prejudice and antipathy," laws treating the sexes differently "very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441.

Despite the fact that mental retardation is an immutable characteristic, beyond the individual's control, affecting a small and readily observable minority who, now and in the past, have been subjected frequently to invidious discrimination, the Court would not upgrade the level of scrutiny applied to this type of legislative classification.

> [I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. at 445. Likewise, if gender were deemed a "quasi-inherently suspect" classification, it would be difficult to find a principled way to recognize in law the real differences between the sexes.[5]

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[5] Petitioner and its *amici* have argued that the Court should declare gender an "inherently suspect" classification "to remove any remaining ambiguity" (U.S. Br. 35), "to eliminate confusion in the lower courts, and to resolve serious inconsistencies in the law resulting from this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion)" (Brief of *Amici Curiae* National Women's Law Center, *et al.*, 5). Petitioner and its *amici* are mistaken. Ratcheting up the level of scrutiny given to "gender" cases will not produce better informed and better reasoned opinions. Instead it will prompt courts to declare gender classifications *per se* invalid, regardless of the existence of merely "important" state interests supported by only "substantial" rationales. Worse, the prospect of litigation will chill state action, so that programs legitimately aimed at helping one sex (usually women) will simply cease to be adopted.

This Court should not depart from the standard it has followed in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Indeed, adopting strict scrutiny would directly conflict with this Court's prior decisions applying an intermediate standard to uphold gender-based classifications.[6]

As the Court has noted, "any departure from the doctrine of *stare decisis* demands special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).[7] Petitioner, however, offers no special justification other than its own conclusion that strict scrutiny is the "correct" standard. (U.S. Br. 33) Petitioner observes that sex, like race, is an immutable and visible characteristic; that the government still employs gender stereotypes in decision making; that historical parallels between official discrimination affecting women and racial minorities exist; and that women suffer "relative political powerlessness." (U.S. Br. 34-36) None of these observations suggests that the Court ought to abandon its firmly established approach to gender classifications. Significantly, petitioner does not argue that intermediate scrutiny is inadequate to address invidious discrimination against women.

In fact, no special justification exists, because intermediate scrutiny is an appropriate standard of review. It subjects gender classifications to a meaningful, "heightened" review while recognizing that differences between men and women – unlike the differences between members of different races – will justify gender classifications in some circumstances.

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[6] *See Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

[7] This is especially true in the context of a long-established precedent. *See generally Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2808-16 (1992).

Bearing in mind that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause,"[8] we nevertheless offer some statistics to rebut petitioner's unsupported observations.

Women are not politically powerless. Unlike racial minorities, women constitute a majority of the population of the United States; as of 1994, women outnumbered men 51.2% to 48.8%.[9] In the voting age population, women not only outnumber men but consistently register and vote in higher proportions than men.[10] Women already have the political power to elect women to represent them; indeed if all women voted the same and chose to elect only women, virtually every elected office in the United States could be filled by a woman. Instead, women exercise their franchise as individuals and vote for candidates, male or female, as a matter of individual choice.

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[8] *Craig v. Boren*, 429 U.S. at 204.

[9] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 21, Table 21 (1995) [hereinafter "STATISTICAL ABSTRACT"].

[10] *Id.* at 289, Table 459. About 52% of women report that they are Democrats versus 37% Republicans, with 10% described as independents and 1% as apolitical. Among men, 46% describe themselves as Republicans, 43% as Democrats, 11% as independents, and 1% as apolitical. Id. at 288, Table 458. Women constitute a minority of members of the U.S. Congress, but between 1981 and 1995 their numbers increased from 19 to 47 in the House of Representatives, and from 2 to 8 in the Senate. *Id.* at 281, Table 444. In 1995, there were 84 women in statewide elective office (not including elected judges and elected members of university boards or boards of education) and 1,535 in state legislatures. *Id.* at 285, Table 453. As of 1992, there were over 100,000 women in local elected offices. *Id.* Table 452.

Women are not excluded from the workplace. Overall, women constitute over 45.9% of the civilian labor force in the United States. Among women of all ages, 58.8% work outside the home, versus 75.1% of men. Among those aged 25-54, about 74% of women and 89% of men work outside the home.[11]

Women are not compensated less merely because of their sex. The ratio of female-to-male, year-round full-time earnings was 71 cents on the dollar in 1992. This includes workers of all ages. Among younger workers (ages 25-34) the ratio was 82 cents on the dollar, versus 67 cents for older workers (ages 55-64). "[S]erious economics scholars who are trained to interpret these data (including many eminent female economists) point out that most of the differences in earnings reflect such prosaic matters as shorter work weeks and lesser workplace experience."[12] An "apples-to-apples" comparison yields even more encouraging results. According to research by former Baruch College economics professor, now Congressional Budget Office director, Dr. June E. O'Neill, "among people 27 to 33 who have never had a child, the earnings of women in the National Longitudinal Survey of Youth are close to 98% of men's."[13]

Women are not relegated to the "worst" jobs. Women and men make different career choices, but women's career opportunities are not invariably inferior to men's. According to 1994 Bureau of Labor Statistics reports, women represent 48.1% of workers in executive, administrative and managerial jobs. Women are 61.6% of personnel and labor relations managers, and 79.7% of health and medicine managers. Women are 64.3% of workers in technical, sales and admin-

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[11] *Id.* at 399, Table 627.

[12] CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 240-41 (1994).

[13] June E. O'Neill, *The Shrinking Pay Gap*, WALL ST. J., Oct. 7, 1994, at A14.

istrative support, and 59.6% of workers in service occupations. Women have low representation in production, craft and repair industries (9.3%), among machine operators and laborers (24.3%), and in farming, forestry and fishing (19.3%). These categories include some of the fastest declining occupations, as projected by the Bureau of Labor Statistics for 1992-2005.[14]

Women are not excluded from educational and professional opportunities. In recent years women have steadily increased their representation in the professions and in educational achievement generally. As of 1994, women were 22.3% of physicians, up from 15.8% in 1983, and 24.8% of lawyers and judges, up from 15.8% in 1983.[15] In 1992, 35.7% of M.D. degrees and 42.7% of J.D. degrees were conferred on women.[16] Between 1971 and 1992, the percentage of bachelor's degrees conferred on women rose from 43.4% to 54.2%, from 40.1% to 54.1% for master's degrees, and from 14.3% to 37.1% for doctorate degrees.[17]

Women are not prevented from owning their own businesses. According to the Small Business Administration, between 1980 and 1990, the number of women-owned businesses increased from about 2,000,000 with $25 billion in sales to more than 5,000,000 with over $80 billion in sales. In the same period, when the overall number of business owners increased by 56%, the number of women business owners increased 82%.[18]

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[14] STATISTICAL ABSTRACT, *supra* note 9, at 415, Table 651. Perhaps this is bad news for women, but it is worse news for men.

[15] *Id.* at 411, Table 649.

[16] *Id.* at 192, Table 302.

[17] *Id.* at 190-91, Tables 300-301.

[18] Elizabeth Larson, *Victims in the Workplace*, INVESTOR'S BUSINESS DAILY, June 2,1995.

The term "strict scrutiny" implies that it imposes a more demanding burden of proof than "intermediate scrutiny." In practice, it operates as a presumption of invalidity. The progress made by women in the last generation and the success that increasing numbers of women enjoy today rebut any assertion that they require "strict scrutiny" to protect their interests. Indeed, rather than asking the Court to adopt strict scrutiny as the standard for reviewing gender classifications, a more honest approach would be to ask the Court to take this opportunity to declare women emancipated – to affirm that women are human beings and citizens, with all the rights and responsibilities that entails.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

ANITA K. BLAIR
(Counsel of Record)
C. DOUGLAS WELTY
WELTY & BLAIR, P.C.
2111 Wilson Boulevard, Suite 550
Arlington, Virginia 22201
(703) 276-0114

Attorneys for Amici

December 15, 1995

APPENDIX

The Women's Economic Project is a committee formed under the auspices of the Independent Women's Forum. Its members are women who are professional economists. The Women's Economic Project advises and assists IWF in analyzing and evaluating census, survey and other data relating to women in the economy.

Diana Furchtgott-Roth, the chairman of the Women's Economic Project, is a Resident Fellow at the American Enterprise Institute for Public Policy Research in Washington, D.C., where she specializes in economic, tax and regulatory policy issues.

Linda Chavez is chairman and president of the Equal Opportunity Foundation in Washington, D.C. She is an author and commentator on public policy issues. She has served as U.S. Expert on the United Nations Subcommission on Human Rights. From 1983 to 1985 she was Director of the U.S. Commission on Civil Rights. From 1977 to 1983, she was editor of *American Educator*, the prize-winning quarterly journal of the American Federation of Teachers.

Lynne V. Cheney is the W.H. Brady, Jr., Distinguished Fellow at the American Enterprise Institute for Public Policy Research in Washington, D.C., and an author and commentator on education, culture and public policy issues generally. From 1986 through 1992 she was Chairman of the National Endowment for the Humanities, an independent federal agency that supports education, research, preservation and public programs in humanities. Mrs. Cheney holds a Ph.D. in English and has taught at several colleges and universities. She is a member of the board of directors of the Independent Women's Forum.

Christina Hoff Sommers is an associate professor of philosophy at Clark University, Worcester, Massachusetts, who specializes in contemporary moral theory. She is the editor of two ethics textbooks and the author of *Who Stole Feminism?*. She has also published numerous professional papers as well as articles in publications such as The New Republic, The Wall Street Journal, and the New England Journal of Medicine.

Abigail Thernstrom is a Senior Fellow at the Manhattan Institute in New York and an Adjunct Professor of Education at Boston University. She is a member of the Massachusetts State Board of Education. Her book, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987), won four awards including the American Bar Association's Certificate of Merit. She attended Barnard College, and has a Ph.D. from Harvard University.